

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DAVID DESHAWN BROWN,

Defendant-Appellant.

UNPUBLISHED

November 15, 2002

No. 235369

Oakland Circuit Court

LC No. 2000-174148-FH

Before: Murray, P.J., and Cavanagh and Bandstra, JJ.

PER CURIAM.

Defendant appeals as of right his jury convictions for carrying a concealed weapon (CCW), MCL 750.227, felon in possession of a firearm, MCL 750.224f, felony-firearm, MCL 750.227b, and resisting and obstructing arrest, MCL 750.479. We affirm.

Defendant's convictions arise from a routine traffic stop for a broken taillight. While approaching the vehicle, an officer detected a partially empty bottle of rum on the rear floorboards of defendant's car. When another officer asked defendant to get out of his vehicle, defendant initially complied, but then ran from the officers. During the pursuit, defendant, a convicted felon, dropped a handgun he was carrying.

On appeal, defendant argues that the trial court violated the double jeopardy clauses of the United States and Michigan constitutions when it punished him for violations of both the CCW statute and the felony-in-possession statute. While this issue was raised at the preliminary examination, defendant failed to bring it before the trial court. An issue is not preserved for appeal if the trial court has not heard it and ruled on it. *People v Grant*, 445 Mich 535, 546; 520 NW2d 123 (1994). We review unpreserved constitutional questions for plain error. *People v Carines*, 460 Mich 750, 764; 597 NW2d 130 (1999).

The double jeopardy clauses of the United States and Michigan constitutions prohibit courts from imposing multiple punishments for the same offense. US Const, Am V; Const 1963, art 1, § 15; *People v Rodriguez*, 251 Mich App 10, 17; 650 NW2d 96 (2002). When a trial court sentences a defendant for violating multiple statutes with a single act, the issue becomes whether the Legislature intended separate punishment to follow from each statute. See *People v Denio*, 454 Mich 691, 706; 564 NW2d 13 (1997). Defendant argues that the statutes' similarity in substance and authorized punishment indicates the Legislature's intent to allow only one punishment when a defendant is convicted under each statute. We disagree.

The United States Supreme Court has reduced double jeopardy analysis to a logistical calculation. If each crime contains an element that is not found in the other, then the crimes are separate for double jeopardy purposes. *United States v Dixon*, 509 US 688, 696; 113 S Ct 2849; 125 L Ed 2d 556 (1993). Here, each statute contains elements that are not found in the other. The CCW statute requires that the bearer conceal the weapon and does not require the bearer to be a felon. MCL 750.227. Conversely, the felon-in-possession statute does not require concealment, but the bearer must be a felon. MCL 750.224f. Because they are separate crimes under the federal constitutional analysis, the trial judge could separately punish defendant's violation of each statute without violating the federal Double Jeopardy Clause, US Const, Am V.

Under the Michigan Constitution, Const 1963, art 1, § 15, legislative intent is determined by evaluating statutory construction and considering the subject, language, and history of the statutes. *Denio, supra* at 708. The court should also consider whether the statutes prohibit conduct that violates different social norms. *People v Robideau*, 419 Mich 458, 487; 355 NW2d 592 (1984). In *People v Mayfield*, 221 Mich App 656, 662; 562 NW2d 272 (1997), this Court heard an identical double-jeopardy challenge to separate sentences imposed for felon-in-possession and CCW convictions. In that case, too, the charges arose out of the defendant's possession of one firearm on one occasion. *Id.* at 658. There, we held that the statutes protected different social norms, and so separate punishments were permissible. *Id.* at 662. Because the trial judge properly applied this Court's binding precedent, it did not commit plain error.

Alternatively, defendant argues that, if the double jeopardy issue was not preserved below, then he was denied his right to effective assistance of counsel. Because defendant failed to move for a *Ginther*¹ hearing below, this Court's review is limited to errors apparent on the record. *People v Rodgers*, 248 Mich App 702, 713-714; 645 NW2d 294 (2001).

Attorneys are not required to make meritless or novel arguments. *People v Reed*, 453 Mich 685, 695; 556 NW2d 858 (1996); *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000). Because defendant's arguments suggest overturning established precedent, trial counsel had no obligation to raise them below. Therefore, defendant was not denied the effective assistance of counsel.

Finally, defendant claims that the Legislature intended the felon-in-possession statute merely as an expansion of the CCW statute. Defendant argues that, because the felon-in-possession statute excludes carrying a concealed weapon as a predicate felony to a felony-firearm conviction, MCL 750.227b, felon-in-possession should be precluded as a predicate felony as well. Because defendant also failed to preserve this issue for appeal, we review it for plain error. See *Carines, supra*.

This Court addressed this issue in *People v Dillard*, 246 Mich App 163, 170; 631 NW2d 755 (2001) and held "had the Legislature wished to exclude the felon in possession charge as a basis for liability under the felony-firearm statute, the Legislature would have amended the felony-firearm statute to explicitly exclude the possibility of a conviction under the felony-firearm statute that was premised on MCL 750.224f." While framed in double jeopardy terms,

¹ *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).

Dillard answered the predicate felony issue by ultimately holding that the Legislature intended to allow a felony-firearm conviction to be based on the felon-in-possession felony. *Id.* Therefore, the trial court did not plainly err by failing to dismiss defendant's felony-firearm charge as impermissibly based on a felon-in-possession charge.

Affirmed.

/s/ Christopher M. Murray

/s/ Mark J. Cavanagh

/s/ Richard A. Bandstra